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The obligation to extradite or prosecute (*aut dedere aut judicare*)

Comments and information received from Governments

I. Introduction

1. The present report has been prepared pursuant to General Assembly resolution 62/66 of 6 December 2007, in which the Assembly, inter alia, invited Governments to provide to the International Law Commission information on practice regarding the topic "The obligation to extradite or prosecute (*aut dedere aut judicare*)".

2. At its fifty-eighth session, in 2006, the Commission decided in accordance with article 19 (2) of its Statute to request, through the Secretary General, Governments to submit information concerning their legislation and practice, particularly the more contemporary, with regard to this topic. More specifically, Governments were requested to provide information concerning:

"(a) International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservation made by that State to limit the application of this obligation;

"(b) Domestic legal regulation adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute (*aut dedere aut judicare*);

"(c) Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*;

"(d) Crimes or offences to which the principle of the obligation *aut dedere aut judicare* is applied in the legislation or practice of a State."[1]

[1] See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 10* (A/61/10), para. 30.

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3. At its fifty-ninth session, in 2007, the Commission further requested Governments to submit information concerning their relevant legislation and practice, particularly the more contemporary, more specifically on:

"(a) International treaties by which a State is bound, containing the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(b) Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes or codes of criminal procedures, concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(c) Judicial practice of a State reflecting the application of the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

"(d) Crimes or offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of a State; is it connected with the obligation *aut dedere aut judicare*?"[2]

4. At the same session, the Commission also indicated that it would appreciate information on:

"(a) Whether the State has authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?

"(b) Whether the State has authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?

"(c) Whether the State considers the obligation to extradite or prosecute as an obligation under customary international law and if so to what extent?"[3]

5. Comments received at the fifty-ninth session of the Commission were reproduced in document A/CN.4/579 and Addenda 1 to 4. Since then, and as at 30 May 2008, written observations have been received from the following five States: Chile, Guatemala, Mauritius, the Netherlands and the Russian Federation. Additional information received will be reproduced as addenda to the present report.

II. Comments and information received from Governments

Chile

6. As a complement to the information reproduced in document A/CN.4/579/Add.1, Chile submitted a list of multilateral treaties to which it is party, containing the obligation to extradite or prosecute: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,[4] adopted on 10 December 1984 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 808 of 7 October 1988, Diario Oficial, 26 November 1988;

[2] Ibid., *Sixty-second Session, Supplement No. 10* (A/62/10), para. 31.

[3] Ibid., para. 32.

[4] United Nations, *Treaty Series*, vol. 1465, No. 24841.

Inter-American Convention to Prevent and Punish Torture, adopted on 9 December 1985 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 809 of 7 October 1988, Diario Oficial, 26 November 1988; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[5] adopted on 14 September 1973 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 129 of 28 February 1977, Diario Oficial, 29 March 1977; the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,[6] adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, Diario Oficial, 17 April 1951; Geneva Convention for the Amelioration of the Conditions of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea,[7] adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, Diario Oficial, 17 April 1951; Geneva Convention relative to the Treatment of Prisoners of War,[8] adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, Diario Oficial, 18 April 1951; Geneva Convention relative to the Protection of Civilian Persons in Time of War,[9] adopted on 12 August 1949 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 752 of 5 December 1950, Diario Oficial, 19 and 20 April 1951; International Convention for the Suppression of the Financing of Terrorism,[10] adopted by the United Nations General Assembly on 9 December 1999 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 163 of 3 July 2002, Diario Oficial, 13 September 2002; International Convention for the Suppression of Terrorist Bombings,[11] adopted by the United Nations General Assembly on 15 December 1997 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 519 of 20 November 2001, Diario Oficial, 6 February 2002; International Convention against the Taking of Hostages,[12] adopted by the United Nations General Assembly on 17 December 1979 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 989 of 16 November 1981, Diario Oficial, 8 January 1982; Convention for the Suppression of Unlawful Seizure of Aircraft,[13] signed at The Hague on 16 December 1970 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 147 of 20 March 1972, Diario Oficial, 19 April 1972; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation,[14] signed at Montreal on 23 September 1971 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 736 of 4 November 1975, Diario Oficial, 11 December 1975; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention of 1971,[15] signed at Montreal on 24 February 1988 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 519 of 10 July 1989, Diario Oficial, 9 September 1989;

[5] Ibid., vol. 1035, No. 15410.
[6] Ibid., vol. 75, No. 970.
[7] Ibid., No. 971.
[8] Ibid., No. 972.
[9] Ibid., No. 973.
[10] Ibid., vol. 2178, No. 38349.
[11] Ibid., vol. 2149, No. 37517.
[12] Ibid., vol. 1316, No. 21931.
[13] Ibid., vol. 860, No. 12325.
[14] Ibid., vol. 974, No. 14118.
[15] Ibid., vol. 1589, No. I-14118.

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation and its Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms located on the Continental Shelf,[16] adopted in Rome on 10 March 1988 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 793 of 3 June 1994, Diario Oficial, 8 August 1994; Convention on the Safety of United Nations and Associated Personnel,[17] adopted in New York on 9 December 1994 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 712 of 12 May 1999, Diario Oficial, 21 July 1999; United Nations Convention against Corruption, adopted in New York on 31 October 2003 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 375 of 23 November 2006, Diario Oficial, 30 January 2007; Inter-American Convention Against Corruption, adopted in Caracas on 29 March 1996 and promulgated by supreme decree of the Ministry of Foreign Affairs No. 1879 of 29 October 1998, Diario Oficial, 2 February 1999.

Guatemala

International treaties by which Guatemala is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation

7. Guatemala submitted the following list of relevant multilateral treaties: the four Geneva Conventions of 12 August 1949 (Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention); Convention relative to the Treatment of Prisoners of War (Third Convention); and Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention)); Single Convention on Narcotic Drugs of 30 March 1961;[18] Convention for the Suppression of Unlawful Seizure of Aircraft of 16 December 1970; Convention on Psychotropic Substances of 21 February 1971;[19] Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 23 September 1971; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 14 December 1973; International Convention against the Taking of Hostages of 17 December 1979; Convention on the Physical Protection of Nuclear Material of 3 March 1980;[20] International Convention for the Suppression of Terrorist Bombings of 15 December 1997; International Convention for the Suppression of the Financing of Terrorism of 9 December 1999; United Nations Convention against Transnational Organized Crime of 15 November 2000; United Nations Convention against Corruption of 31 October 2003; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984.

[16] Ibid., vol. 1678, No. 29004.
[17] Ibid., vol. 2051, No. 35457.
[18] Ibid., vol. 520, No. 6465.
[19] Ibid., vol. 1019, No. 14956.
[20] Ibid., vol. 1456, No. 24631.

8. Guatemala further noted that it is a party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948[21] and to the International Convention on the Suppression and Punishment of the Crime of Apartheid of 30 November 1973, neither of which contains an obligation to extradite or prosecute, but both of which oblige States parties to establish jurisdiction over the corresponding offences and to extradite in accordance with the legislation of each State. In addition, Guatemala has signed, but not ratified, the Rome Statute of the International Criminal Court of 17 July 1998[22] and the Inter-American Convention on Extradition of 25 February 1981.

9. Guatemala also submitted a list of relevant regional treaties: Convention on Private International Law (Bustamante Code) of 20 February 1928; Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance of 2 February 1971; Inter-American Convention to Prevent and Punish Torture of 9 December 1985; Inter-American Convention on Forced Disappearance of Persons of 9 June 1994; Inter-American Convention against Corruption of 29 March 1996; Inter-American Convention on Extradition of 26 December 1933; Central American Convention on Extradition of 7 February 1923.

10. Guatemala noted that its reservations to the multilateral and regional treaties listed above did not affect their provisions relating to the obligation to extradite or prosecute.

11. Guatemala further submitted a list of relevant bilateral treaties: Treaty on Extradition of Criminals between Guatemala and Belgium; Additional Convention to the Treaty on Extradition between Guatemala and Belgium; Additional Protocol to the Convention on Extradition between Guatemala and Belgium; Treaty on Extradition between Guatemala and Spain; Additional Protocol to the Treaty on Extradition between Guatemala and Spain; Treaty on Extradition between Guatemala and the United States of America; Supplementary Convention to the Treaty on Extradition between Guatemala and the United States; Treaty on Extradition between Guatemala and the United Kingdom of Great Britain and Northern Ireland; Additional Protocol to the Treaty on Extradition between Guatemala and the United Kingdom; Exchange of notes extending the provisions of the Treaty on Extradition to certain territories under the mandate of the United Kingdom; Treaty on Extradition between Guatemala and Mexico; Treaty on Extradition between Guatemala and the Republic of Korea.

12. Lastly, Guatemala reported that it had signed three treaties that have not yet entered into force: Agreement on Extradition between Guatemala and Brazil; Treaty on Extradition between Guatemala and Peru; Central American Treaty on Arrest Warrants and Simplified Extradition Procedures.

Domestic legal regulations adopted and applied by Guatemala, including constitutional provisions and penal codes or codes of criminal procedures, concerning the obligation to extradite or prosecute

13. Extradition is dealt with in article 27 of the Political Constitution of the Republic of Guatemala, which states that extradition is governed by the provisions

[21] Ibid., vol. 78, No. 1021.

[22] Ibid., vol. 2187, No. 38544,

of international treaties. This provision also states that extradition of Guatemalans shall not be attempted for political offences, and in no case will they be handed over to a foreign Government, except as established in treaties and conventions with respect to crimes against humanity or against international law. This article is the basis for ordinary domestic legislation on the subject, such as articles 5 and 8 of the Penal Code[23] (Decree No. 17-73 of the Congress of the Republic and its amendments) and other legal and regulatory provisions, such as articles 68 and 69 of the Act to Combat Trafficking in Narcotic Drugs, Agreement No. 8-2005 of the Supreme Court of Justice — which establishes which courts are competent to rule on extradition requests — and Supreme Court of Justice Registry Circular No. 3426-B of 13 May 1952.

14. Owing to the fact that under the Constitution extradition is governed by international treaties, the few domestic provisions in force on the subject are largely procedural in nature and supplementary to those treaties. Domestic legislation must comply with recognized international principles concerning extradition, for example, that extradition shall not be granted in the case of nationals of the requested country, for misdemeanours or minor offences punishable by less than one year in prison or for political offences or related ordinary offences, and that the person being extradited will not be given a harsher sentence than the sentence applicable in the requested country or the death sentence.

15. As regards the obligation not to hand over nationals, article 27 of the Constitution prohibits the extradition of nationals only in the case of political offences, but makes an exception for crimes against humanity or against international law, in accordance with the international treaties to which Guatemala is a party. Accordingly, it may be inferred by exclusion that the Constitution does not prohibit the handover of nationals, since the Guatemalan authorities have discretion to grant or deny extradition. If they deny an extradition request, however, there is an obligation to prosecute.

16. In the same vein, article 5, paragraph 3, of the Penal Code provides an example of a specific case in which Guatemala accepts the obligation *aut dedere aut judicare*, since it states that Guatemalan penal law shall apply to "acts committed outside Guatemala by a Guatemalan where a request for extradition has been denied".

17. Unlike the Penal Code, which deals with ordinary offences, articles 68 and 69 of Guatemala's Act to Combat Trafficking in Narcotic Drugs establish a number of parameters for drugs-related offences, as follows:

> "Article 68. Extradition and procedure for dealing with extradition requests. [...]
>
> > (i) In the event that extradition is denied, either by judicial ruling or by decision of the executive branch, Guatemala shall be obliged to prosecute the person whose extradition has been denied and to send a certified copy of the sentence to the requesting State.

[23] Article 5, paragraph 3, reads as follows: "Acts committed outside Guatemala by a Guatemalan where a request for extradition has been denied." Article 8 reads as follows: "Extradition may be attempted or granted only for ordinary offences. Extradition in accordance with international treaties may be granted only if there is reciprocity. ..."

This article shall apply to the offences characterized in this law.

Article 69. The right to waive extradition proceedings. The State of Guatemala may hand over the person being sought to the requesting party without conducting formal extradition proceedings, provided that the person being sought expresses his or her consent to being handed over before a competent judicial authority."

18. In practice, extradition is not granted simply out of reciprocity in Guatemala. Article 8 of Guatemala's Penal Code establishes that extradition may be attempted or granted only for ordinary offences. It also establishes that extradition in accordance with international treaties may be granted only if there is reciprocity. However, this provision has been superseded by article 27 of the Constitution, which states that extradition is governed by international treaties. Moreover, Guatemalan criminal legislation does not define what is meant by ordinary offences or specify when they are deemed to be political offences. In practice and according to the jurisprudence of the courts, however, the term "political offence" refers to crimes against the security of the State or against the institutional order (Titles XI and XII of the Penal Code).

Crimes or offences to which the principle of the obligation to extradite or prosecute is applied in the legislation or practice of Guatemala

19. Guatemala explained that any offence that is extraditable under one or more of the treaties listed above implicitly carries an obligation *aut dedere aut judicare*, provided that no exception is made with respect to the obligation to prosecute in the event that extradition is denied.

Mauritius

20. Mauritius submitted a list of international treaties, to which it is party, containing the obligation to extradite or prosecute: the four Geneva Conventions of 12 August 1949 (Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War, 1949); Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, done at Geneva on 10 June 1977[24] and Additional Protocol II to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, done at Geneva on 10 June 1977;[25] Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970 (ratified on 25 April 1983); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971 (ratified on 25 April 1983); Convention on Psychotropic Substances, Vienna, 1971 (acceded on 8 May 1973); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons including Diplomatic Agents, New York, 1973 (acceded on 24 September 2003); International Convention against the Taking of

[24] United Nations, *Treaty Series*, vol. 1125, No. 17512.
[25] Ibid., No. 17513.

Hostages, New York, 1979 (ratified on 17 October 1980); Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, New York, 1984 (acceded on 9 December 1992); Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988 (acceded on 21 July 2004); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988[26] (acceded on 6 March 2001); International Convention for the Suppression of Terrorist Bombings, New York, 1997 (acceded on 24 January 2003); International Convention for the Suppression of the Financing of Terrorism, New York, 1999 (ratified on 14 December 2004); United Nations Convention against Transnational Organized Crime, New York, 2000 (ratified on 18 April 2003); the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, 2000, supplementary to the United Nations Convention against Transnational Organized Crime (acceded on 24 September 2003); United Nations Convention against Corruption, New York, 2003 (ratified on 14 December 2004).

21. Mauritius also ratified, on 5 April 1983, the Convention on Offences and Certain Other Acts Committed on Board Aircraft, Tokyo, 1963.[27] However that Convention did not impose an obligation to extradite or prosecute, but only required each Contracting State to take such measures as may be necessary to establish its jurisdiction as the State of registration over offences committed on board aircraft registered in such State.

22. Mauritius further indicated that it had concluded a few bilateral extradition treaties with some countries. However, those bilateral treaties on extradition merely created an obligation to extradite under certain conditions as opposed to an obligation to extradite or prosecute.

23. Mauritius explained that it did not have any specific domestic legislation on the obligation to extradite or prosecute. Even the Extradition Act 1970, which regulated extradition practice in Mauritius, did not contain any provision on *aut dedere aut judicare*. On the other hand, the Extradition Act did not prohibit the extradition of Mauritian nationals; usually in countries where extradition was refused on the basis of nationality, the application of the principle of *aut dedere aut judicare* was required to prevent impunity on the basis of nationality. Under the Prevention of Corruption Act (2002), corruption offences were merely extraditable. The Act did not create an obligation to prosecute or extradite. In that connection section 80 of the Act provided: "Any corruption offence shall be deemed to be an extradition crime for which extradition may be granted or obtained under the Extradition Act." Similarly, section 29 of the Financial Intelligence and Anti-Money-Laundering Act 2002 stated that money-laundering offences were extraditable. The Act did not stipulate an obligation to prosecute or extradite.

24. Mauritius has a few statutory provisions creating jurisdiction for specified crimes, thus enabling the Director of Public Prosecutions to prosecute. In this connection, the Convention for the Suppression of the Financing of Terrorism Act 2003, which implements the Convention for the Suppression of the Financing of Terrorism, provides for the application of the principle of *aut dedere aut judicare*. The financing of terrorism, whether committed in Mauritius or overseas, constitutes

[26] Ibid., vol. 1582, No. 27627.
[27] Ibid., vol. 704, No. 10106.

an offence under section 4 of the Convention for the Suppression of the Financing of Terrorism Act 2003. Section 7(i)(h) of the said Act confers jurisdiction upon a Mauritian Court to try a person suspected of financing terrorism provided the suspect is, after the commission of the act, present in Mauritius whether the act constituting the offence is committed within or outside Mauritius and the person cannot be extradited to a foreign State having jurisdiction over the offence. In the light of the foregoing, it would appear that Mauritian courts are empowered to exercise extraterritorial jurisdiction over foreign nationals suspected to have committed the offence of financing terrorism overseas. The Act creates jurisdiction for the Mauritian Courts to try the offence of financing terrorism, but because any such prosecution is subject to the inability of Mauritius to extradite the suspect, it is clear that the Act provides for the application of the principle of *aut dedere aut judicare*. Similarly the obligation to extradite or prosecute is equally found under section 30(c) of the Prevention of Terrorism Act 2002, which provides that a Mauritian Court shall have jurisdiction to try an offence and inflict the penalties specified in the Act where the act constituting the offence as defined thereunder has been done or completed outside Mauritius and the alleged offender is in Mauritius, and Mauritius does not extradite the alleged offender.

25. Furthermore, Mauritius observed that there were other instruments of cooperation in place to facilitate international cooperation in criminal matters. For example, the Mutual Assistance in Criminal and Related Matters Act 2003 provided for a broad range of assistance including, inter alia, taking of evidence or statements of persons, search and seizure, the provision of documents or evidentiary items, the service of documents and the temporary transfer of persons to assist an investigation or appear as a witness.

The Netherlands

International treaties by which a State is bound, containing the obligation to extradite or prosecute, and reservations made by that State to limit the application of this obligation

26. The Netherlands listed the following relevant treaties: International Convention for the Suppression of Counterfeiting Currency, Geneva, 1929; Convention for the Suppression of Illicit Traffic in Dangerous Drugs, Geneva, 1936; Geneva Conventions of 1949 (the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Convention relative to the Treatment of Prisoners of War and Convention relative to the Protection of Civilian Persons in Time of War); Convention on the High Seas, Geneva, 1958;[28] Single Convention on Narcotic Drugs, New York, 1961; Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 1970; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 1971; Convention on Psychotropic Substances, Vienna, 1971; International Convention for the Prevention of Pollution from Ships, 1973;[29] Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, New York,

[28] Ibid., vol. 450, No. 6465.

[29] Ibid., vol. 1340, No. 22484.

1973; Protocol I Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflict, Geneva, 1977; European Convention on the Suppression of Terrorism, Strasbourg, 1977; International Convention against the Taking of Hostages, New York, 1979; Convention on the Physical Protection of Nuclear Material, Vienna, New York, 1980; United Nations Convention on the Law of the Sea, Montego Bay, 1982;[30] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, New York, 1984; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 1988; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 1988; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Montreal Convention, Montreal, 1988; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, Rome, 1988; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, New York, 1992;[31] Convention on the Safety of United Nations and Associated Personnel, New York, 1994; Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Paris, 1997; International Convention for the Suppression of Terrorist Bombings, New York, 1997; International Convention for the Suppression of the Financing of Terrorism, New York, 1999; Criminal Law Convention on Corruption, Strasbourg, 1999;[32] United Nations Convention against Transnational Organized Crime, New York, 2000; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, New York, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; Protocol against the Smuggling of Migrants by Land, Sea and Air, New York, 2000, supplementary to the United Nations Convention against Transnational Organized Crime; Convention on Cybercrime, Budapest, 2001;[33] Council Framework Decision on the European Arrest Warrant and the surrender procedure between member States, Brussels, 2002; United Nations Convention against Corruption, New York, 2003.

27. The Netherlands has signed the Protocol amending the European Convention on the Suppression of Terrorism and the International Convention for the Suppression of Acts of Nuclear Terrorism and is in the process of ratifying these treaties.

28. The Netherlands is also a party to the European Convention on Extradition (1957) and both its additional protocols (1975, 1978), which do not contain an obligation *aut dedere aut judicare*, but further international judicial cooperation in the area of criminal law.

29. The Netherlands has also concluded several bilateral extradition agreements.

30. Finally, the Netherlands noted that it is party to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948 and the Convention on Offences and Certain Acts Committed on Board Aircraft, 1963, which do not contain an obligation to extradite or prosecute, but require States to establish jurisdiction in respect of certain offences.

[30] Ibid., vol. 1833, No. 31363.

[31] Ibid., vol. 1974, No. 33757.

[32] European Treaty Series No. 173.

[33] European Treaty Series No. 185.

Domestic legal regulations adopted and applied by a State, including constitutional provisions and penal codes of criminal procedures, concerning the obligation to extradite or prosecute

31. In October 2003, a new law with regard to international crimes entered into force in the Netherlands, which provides for the possibility to prosecute persons suspected of having committed international crimes if the suspect committed international crimes abroad but is arrested on Dutch territory; the suspect committed international crimes abroad against Dutch nationals; the suspect has Dutch nationality. The international crimes considered in this law are genocide, crimes against humanity, war crimes and torture.

Judicial practice of a State reflecting the application of the obligation *aut dedere aut judicare*

32. The Netherlands observed that the international developments at the time of the emergence of the International Criminal Court had prompted the decision to increase the public prosecutor's department's means for such complex prosecutions. Since then, a member of the military from the Democratic Republic of the Congo and two former members of the military from Afghanistan, who had sought asylum in the Netherlands, had been prosecuted for international crimes and sentenced accordingly. Additionally, two Dutch citizens had been arrested on charges of complicity in war crimes and genocide. Some of them had appealed the decision taken by the court in the first instance. More recently, another former Afghan officer and a Rwandan refugee had been arrested and charged with war crimes and torture. The case against the Rwandan national had initially involved charges for war crimes and genocide. The court in the first instance, however, had found the genocide charge inadmissible. Under the new International Crimes Act it was now possible to prosecute foreign nationals for genocide if they were arrested on Dutch territory. However, in 1994 when the suspect had allegedly committed genocide, there had been no such law in force in the Netherlands (*nullum crimen sine lege*). The Public Prosecutor had filed for appeal but there was no verdict yet.

Russian Federation

International treaties to which the Russian Federation is a party that contain the principle of universal jurisdiction in criminal matters

33. The Russian Federation is a party to the Geneva Conventions of 1949 and Additional Protocol I thereto, which establish universal criminal jurisdiction with regard to war crimes (arts. 49 and 50 of the first Geneva Convention; arts. 50 and 51 of the second Geneva Convention; arts. 129 and 130 of the third Geneva Convention; arts. 146 and 147 of the fourth Geneva Convention; art. 85 of Additional Protocol I of 1977 to the Geneva Conventions).

34. The Russian Federation is also a party to most of the universal and regional international treaties for the suppression of individual crimes that contain the *aut dedere aut judicare* principle. These include, in particular, the Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation of 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973, the European Convention

on the Suppression of Terrorism of 1977, the Convention on the Physical Protection of Nuclear Material of 1979, the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation of 1988, the International Convention for the Suppression of Terrorist Bombings of 1997, the International Convention for the Suppression of the Financing of Terrorism of 1999, the United Nations Convention against Transnational Organized Crime of 2000 and the United Nations Convention against Corruption of 2003.

35. The Russian Federation is a party to the United Nations Convention on the Law of the Sea, article 105 of which establishes universal criminal jurisdiction with regard to piracy.

36. In addition, the Russian Federation is a party to a number of international treaties which contain the principle of universal jurisdiction, though not in connection with the non-extradition of alleged offenders. These include the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and the International Convention on the Suppression and Punishment of the Crime of Apartheid of 1973. The Russian Federation has signed but not yet ratified the Rome Statute of the International Criminal Court.

37. In some international treaties to which the Russian Federation is a party, the *aut dedere aut judicare* principle is not connected with the establishment of universal criminal jurisdiction. For example, article 8 of the International Convention for the Suppression of Counterfeiting Currency of 1929[34] provides that "in countries where the principle of the extradition of nationals is not recognized, nationals who have returned to the territory of their own country after the commission abroad of an offence referred to in Article 3 should be punishable in the same manner as if the offence had been committed in their own territory, even in a case where the offender has acquired his nationality after the commission of the offence".

Legislation of the Russian Federation concerning the principle of universal jurisdiction in criminal matters; is it connected with the obligation *aut dedere aut judicare*?

38. In accordance with article 15, paragraph 4, of the Constitution of the Russian Federation, generally recognized principles and rules of international law and the international treaties to which the Russian Federation is a party shall be an integral part of its legal system. If an international treaty to which the Russian Federation is a party establishes rules that differ from those provided for by law, the rules of international law shall apply.

39. Russian criminal law consists of the Criminal Code of the Russian Federation. Pursuant to article 12, paragraph 3, of the Code, "foreign nationals and stateless persons not permanently residing in the Russian Federation who have committed a crime outside the Russian Federation shall be subject to criminal prosecution under the present Code in cases where the crime is directed against the interests of the Russian Federation or a Russian national or a stateless person permanently residing in the Russian Federation, and in cases provided for by the international treaties to

[34] League of Nations, *Treaty Series*, vol. 112, No. 2623.

which the Russian Federation is a party, if they have not been convicted in a foreign State and are being tried in the territory of the Russian Federation".

40. The application in the Russian Federation of article 12, paragraph 3, of the Criminal Code is connected with the obligation *aut dedere aut judicare* insofar as the Russian Federation exercises its criminal jurisdiction in accordance with the principle of universality on the basis of an international treaty containing that principle.

Crimes and offences to which the principle of universal jurisdiction in criminal matters is applied in the legislation and practice of the Russian Federation

41. Under article 12, paragraph 3, of the Criminal Code of the Russian Federation, the Russian Federation's universal jurisdiction applies only to those crimes in respect of which the Russian Federation is bound by an international treaty to exercise its criminal jurisdiction. This concerns primarily crimes against the peace and security of mankind (arts. 353-360 of the Criminal Code: the planning, preparation, initiation or waging of a war of aggression; public calls for the initiation of a war of aggression; the development, production, accumulation, acquisition or sale of weapons of mass destruction; the use of prohibited means and methods of waging war; genocide; ecocide; mercenary activities; attacks on internationally protected persons or institutions) and a number of other crimes referred to in conventions (art. 206, "Hostage-taking"; art. 211, "Hijacking of an aircraft, sea vessel or railway train"; art. 227, "Piracy"; and other articles of the Criminal Code).

Does the Russian Federation have authority under its domestic law to extradite persons in cases not covered by a treaty or to extradite persons of its own nationality?

42. The Russian Federation engages in international cooperation on extradition matters not only in accordance with the international treaties to which it is a party but also on the basis of the principle of reciprocity. Pursuant to article 462 of its Code of Criminal Procedure, "the Russian Federation, in accordance with the international treaties to which it is a party or on the basis of the principle of reciprocity, may extradite a foreign national or a stateless person who is present in the territory of the Russian Federation to a foreign State for criminal prosecution or for the enforcement of a sentence for acts which are punishable under the criminal law of the Russian Federation and the laws of the foreign State that has requested the extradition of the person". Article 462, paragraph 2, of the Code specifies that "the extradition of a person on the basis of the principle of reciprocity means that, in accordance with assurances from the foreign State that has requested the extradition, it may be expected that, in a si· ilar situation, extradition will be granted at the request of the Russian Federation".

43. The Constitution of the Russian Federation provides that a Russian national may not be extradited to another State (art. 61, para. 1). Article 13, paragraph 1, of the Russian Criminal Code also provides that "Russian nationals who have committed a crime in the territory of a foreign State shall not be subject to extradition to that State".

44. If the Russian Federation refuses to extradite a person to a foreign State and has criminal jurisdiction in respect of that person (including on the basis of

universal jurisdiction), the competent authorities of the Russian Federation propose that the requesting State supply them with the case file so that the person may be prosecuted in the territory of the Russian Federation.

Does the State have authority to assert jurisdiction over crimes occurring in other States that do not involve one of its nationals?

45. The Russian Federation's authority in this regard is provided for in article 12, paragraph 3, of the Criminal Code. As indicated above, the Code provides that the Russian Federation may exercise its criminal jurisdiction in respect of crimes committed outside the Russian Federation by foreign nationals or stateless persons not permanently residing in the territory of the Russian Federation, if the crime is directed against the interests of the Russian Federation or a Russian national or a stateless person permanently residing in the Russian Federation, and in cases provided for by the international treaties to which the Russian Federation is a party, if the foreign nationals or stateless persons not permanently residing in the territory of the Russian Federation have not been convicted in a foreign State.

46. Pursuant to article 460, paragraph 1, of the Code of Criminal Procedure, "the Russian Federation may request a foreign State to extradite a person for criminal prosecution or for the enforcement of a sentence on the basis of an international treaty to which the Russian Federation and the foreign State are parties or on the basis of a written undertaking by the Procurator-General of the Russian Federation from that point onward to extradite persons to that State on the basis of the principle of reciprocity in accordance with the law of the Russian Federation".

Does the Russian Federation consider the obligation to extradite or prosecute to be an obligation under customary international law and, if so, to what extent?

47. The Russian Federation believes that this question requires further study by the Special Rapporteur and the International Law Commission. However, it considers that the following points should be taken into account.

48. The extradition and prosecution of persons are, as a matter of principle, sovereign rights of the State in whose territory the offender is present. Within its territorial jurisdiction, a State is entitled to decide independently whether extradition or the administration of criminal justice is appropriate. In certain circumstances it may even refrain entirely from prosecuting a person, for example, in exchange for testimony or assistance in the conduct of a criminal investigation.

49. It goes without saying that, when an international treaty containing the obligation *aut dedere aut judicare* is concluded, a State may no longer decide at its sole discretion whether to prosecute or extradite an alleged offender, since it becomes bound by the relevant treaty obligation. Moreover, it is hardly possible, under customary international law, to presume the existence of such an obligation, which significantly restricts the sovereign rights of States in a sensitive area of public law.

50. The Russian Federation does not share the view that the existence of an obligation under customary international law may be inferred from the existence of a large body of international treaties that provide for such an obligation. Otherwise it could be asserted that the conclusion by States of a large number of extradition treaties testifies to the emergence of a customary rule that obliges States to grant

extradition requests. However, in itself the existence of such treaties, even a large number of them, is insufficient proof of the existence of a customary rule of international law. At the same time, it is generally accepted that obligations relating to extradition may arise only from the relevant international instruments.

51. In our view, the existence of a customary rule obliging States to exercise their criminal jurisdiction or to grant extradition requests in respect of a specific type of crime may also not readily be inferred from the existence of a customary rule prohibiting these types of crimes.

52. As the International Court of Justice noted in its Judgment in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States. The Russian Federation a priori does not rule out the existence of a rule of customary international law that obliges States to extradite or prosecute persons in respect of certain categories of crime. However, we believe that the existence and scope of application of such a rule may be established only if relevant State practice is identified in the absence of treaty obligations, together with evidence that States act as they do precisely because they consider themselves bound by a rule of law.

53. The latter element here is particularly important, given that in practice it is difficult to determine when a State that extradites or prosecutes a particular person is acting on the basis of the *aut dedere aut judicare* principle. If a State is not bound by a treaty, it may extradite an alleged offender present in its territory not because it considers itself bound by any obligation to another State but simply on the basis of the principle of reciprocity.

54. We believe that significant evidence of *opinio juris* on this issue could come from the judgements of national courts or official declarations of States which state explicitly that the refusal to extradite places an obligation on the requested State to refer the case to the competent national authorities, even in the absence of a relevant treaty obligation. We do not yet see such convincing evidence of the existence of a customary rule *aut dedere aut judicare*.

55. The question of the establishment of an obligation *aut dedere aut judicare* in customary international law with respect to a small number of criminal acts that arouse the concern of the entire international community merits separate analysis. This concerns primarily genocide, war crimes and crimes against humanity.